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SOME REMARKS ON A VERY FIRST FORM OF PROTECTION OF *FIDUCIA*

Abstract

By concluding a fiducia, or by conditional transfer of ownership, the ancient Romans achieved different purposes (preservation of things, money loans etc.) and bypassing the legal formalism at the time. Initially, like many other institutes, fiducia was not protected by lawsuits, but the transferee (fiduciant) he achieved his protection through the institute of usureceptio fuduciae, as a special type of usucapio that Gaius analysed in his Institutes. This paper focuses on the reasons why the transferor had a right on protection by usureceptio fiduciae, possibilities of this protection in the cases of fiduciary agreement concluded with a friend and in the cases where this agreement is concluded with a creditor. Also, this paper is an attempt to answer the question: does the transferor commit the theft with taking over the transferred item?

Key words: *fiducia, usucapio, usureceptio fiduciae, sciens rem alienam usucapit, furtum fiduciae.*

1. INTRODUCTION

Fiduciary transfer is nothing more than a process where one person - transferor, through the *mancipatio*, or *in iure cessio*, transfers the ownership over thing to the other - transferee. This transfer is limited with informal agreement (*pactum fiduciae*) which imposes an obligation for transferee to return the thing after expiration of some time period or when certain conditions are met or to perform some other arranged actions. Firstly *fiducia* was used for safe-keeping of things and it's always been concluded with a friend (*fiducia cum amico contracta*), but latter it has been used to secure creditor's assets and this form of *fiducia* was concluded with creditor (*fiducia cum creditore contracta*). It's also been used in some other cases, such as:

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manumissio, *emancipatio*, *adoptio*, *coemptio*, *mancipatio familiae*, *donatio mortis causa, noxae deditio,* and in the cases of representation in legal procedures[1].

For a long time *fudicia* hasn't been the subject of legal protection. *Actio fiduciae* has been established as an outcome of the fact that, in the conditions of development of Roman economy, there was increased number of cases in which the *fide* has been violated, probably in the first half of 2nd *centurie* B.C[2].

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[1] Gai Inst. II, 60; D. 17, 1,27,1; Gai Inst. I, 132, 134, 114, 115, 115a; Gai Inst. II, 102; D. 39, 6, 42 pr.; Coll. 2, 3, 1; D. 4, 7, 4, 3. See also S. Vladetić, *Zastupanje u postupku i fiducija u starom Rimu,* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Knj. 6, Kragujevac: Pravni fakultet Univerziteta, Institut za pravne i društvene nauke, 2015, 329-331. S. Vladetić, *Prvobitni oblik poklona za slučaj smrti = Donatio mortis causa,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. B. Vlašković), Knj. 1, Kragujevac: Pravni fakultet, Institut za pravne i društvene nauke, 2013, 33-38.Throught the interpretation of the Gaius' Institutiones' text (II, 60) some authors (H. Göppert, *Zur fiducia cum amico contracta,* Zeitschrift der Savigny – Stiftung für Rechtsgeschichte 13, 1892, 325; G. Grosso, *Sulla fiducia a scopo di "manumissio"*, Rivista italiana per le scienze giuridiche (N. S.) 4, 1929, 259; C. Longo, *Corso di diritto romano: La fiducia,* Milano, 1933, 151) considers that those other cases of applying fiducia have been conducted in the type of fiducia cum amico, or that actually there were only two types of fiducia - fiducia cum amico and fiducia cum creditore. Other authors are sharing the opinion that those cases of using the fiducia couldn't be classified as fiducia cum amico, or that there were several types of fiducia. (W. Erbe, *Die Fiduzia im römischen Recht,* Weimar, 1940, 64 and 65; B. Noordraven, *Die fiduzia im römischen Recht,* Amsterdam, 1999, 45 and 48).

[2] H. F. Jolowicz, *Historical introduction to the study of roman law,* Cambridge, 1954, 299; B. Noordraven, *Die fiduzia im römischen Recht*, 8 and B. Noordraven, *Von der "fiducia" zur Treuhandschaft,* Österreichische Notariatszeitung, 127, 1995, 256; C. Vladetić, *Fiducia cum creditore,* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Knj. 4, Kragujevac: Pravni fakultet Univerziteta, Institut za pravne i društvene nauke, 2013, 18; Compare M. Kaser, *Eigentum und Besitz im älteren römischen Recht*, Köln – Graz, 1956, 154 and M. Kaser, *Das römische Privatrecht*, I: Erster Abschnitt: Das altrömische, das vorklassische und das klassische Recht, München, 1971, 461; A. Watson, *The origins of fiducia,* Zeitschrift der Savigny – Stiftung für Rechtsgeschichte 79, 1962, 329 and A. Watson, *The Law of Obligations in the Later Roman Republic*, Oxford, 1965, 172. Also, probably it has been firstly conceived in factum and it also has a clause „ut inter bonos bene agier oportet et sine fraudatione", and later, at the times of Mucius Scaevola, formula in ius, with clause „ex fide bona", overwhelmed the formula in factum. Gai Inst., IV, 62; Cic., De off., 3, 17, 70; Cic., Top. 17, 66; Cic., Ad fam., 7, 12, 2; C. Longo, *op. cit.*, 33, 36-37; H. F. Jolowicz, *op. cit.,* 299 (note 7), 301. Compare O. Lenel, *Das Edictum Perpetuum,* Leipzig, 1927, 292; O. Karlowa, *Römische Rechtsgeschichte II,* Leipzig, 1901, 564; B. Noordraven, *op. cit.,* 324; G. Grosso, *Fiducia,* Enciclopedia del diritto XVII, 1968, 387; W. Erbe, *op. cit.,* 91, 93, 129; A. Burdese, *Fiducia,* Novissimo Digesto Italiano, 7, Torino, 1961, 296; A. Watson, *The Law of Obligations…*, 177. According to Lenel (O. Lenel, *Das Edictum Perpetuum*, 293), fiducia has

Until than the only available mean of protection for the transferor was *usureceptio fiduciae*.

Origin of the term *usureceptio* comes from *usu recipere* which means - to acquire ownership over certain property after the expiring of determined period of time. Because of the fact that for this sort of getting ownership rights over some property there were no demands for the *iusta causa* and *bona fides, usureceptio* as well as *usucapio pro herede* could be classified into the special sorts of usucapio. *Usureceptio fiduciae*, which is going to be analysed in this paper, presents reacquiring of the item (object, thing, assets) transferred through *fiducia*[3].

Sources of information on this institute are very limited. Some data on *usureceptio fiduciae* could be found in Gaius' Institutiones (II, 59 and 60, and III, 201). Moreover, the literature of Roman law criticises this source stating that Gaius wrote *ex professo* about *usureceptio*. These critics go even to the level of claims that he was not able to explain all issues regarding this institute[4]. Therefore, there is misunderstandings in literature about general characteristics of *usureceptio fiduciae*, the moment from which it could be used and also about the theft of transferred object.

2. GENERAL CHARACTERISTICS

(Gai Inst. II, 59): Adhuc etiam ex aliis causis sciens quisque rem alienam usucapit. Nam qui rem alicui fiduciae causa mancipio deveri vel in iure cesserit, si eandem ipse possederit, potest usucapere, anno scilicet, etiem soli si sit. Quae species usucapionis dicitur usureceptio, quia id, quod aliquando habuimus, recipimus per usucapionem.

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been protected in the Legis Actio Procedure with legis actio fiduciae. However, that led to demand for introducing new words and accordingly to the adoption of the new law (About that see P. Oertman, *Die fiduzia im römischen Privatecht,* Berlin, 1890, 93 and 221) that couldn't be found in sources (Compare B. Noordraven, *op. cit.,* 292. See also S. Vladetić, *Nastanak Actio Fiduciae.* Pravni život, 11/2008, 617).

[3] Besides it, there are two other kinds of usureceptio –usureceptio servitutis, reacquiring of servitudes, (P. S. 1, 17, 2; D. 41, 3, 2) and usureceptio ex prediatura, reacquiring of the the article that has been, due to unpaid debt, sold on public sale (Gai Inst. II, 61). See also G. Franciosi, *Usureceptio,* Novissime Digesto Italiano 20, Torino, 1975, 390; S. Vladetić, *Usureceptio fiduciae,* Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke – Janus (Beograd), 2008, 33-34.

[4] W. Erbe, *op. cit.,* 65-66; F. B. J. Wubbe, *Usureceptio und relatives Eigentum*, Tijdschrift voor rechtsgeschiedenis 28, 1960, 29.

In this text Gaius presents some of general characteristics of *usureceptio fiduciae*. There are no doubts about second part of this text. In this part Gaius explains what is the very essence of *usureceptio* or, to be more precise, he presents the fact that if transferor gets the object (even by using the force) that he has given into *fuducia*, he shall be in position to establish the ownership over it by *usucapio* after the expiration of period of one year (without *bona fides* and *iusta causa*), notwithstanding whether the object in matter is moveable or immovable thing. Furthermore, he elaborates that this form of usucapio is called *usureceptio* because with it we are regaining the item which was in our property before.

Also his formulation *si eandem ipse possederit* (regardless the way of getting the item) tells us that this is a very old institute which has been, accordingly to the vast majority of authors, established before the adoption of Law of Twelwe Tables (accordingly the same stays for *fiducia* itself)[5].

However, the first sentence or, more precisely, first part of the first sentence - „*sciens rem alienam usucapit*" - has made more than a few doubts and discussion in academic circles and it's also very important because of the fact that the determination of its meaning could define the moment from which transferor could use *usureceptio*. There are few different theories about meaning of this expression.

According to the first, and most commonly used theory, the term "*sciens rem alienam usucapit*" means that the *transferor acquires* the thing, although he knows that it still belongs to the other person - transferee. When this was the case? In accordance with the rule that contract has to be terminated in the same form that it has been created - *prout quidque contractum, ita et solvi debet,* item which has been passed to transferee by mancipatio or *in iure cessio* has to be returned to transferor in the same form. If the transferee in the process of returning the object uses *traditio* instead of *mancipatio* or in *iure cessio*, transferor shall not become the owner but only possessor. Transferor knows that the object is still formally in the ownership of transferee. However, he has a possibility to reacquire the ownership in the shortened period of

[5] O. Karlowa, *op. cit.,* 569; N. Bellocci, *La struttura della fiducia II: Riflessioni intorno alla forma del negozio dall'epoca arcaica all'epoca classica del diritto romano,* Napoli, 1983, 236 and 237; A. Manigk, *Fiducia,* Pauly-Wissowa Realencyklopadia der classischen Altertumswissenschaft. VI, 2, Stuttgart, 1909, 2290; A. Watson, *The origins of fiducia*, 329 – 334 and A. Watson, *The Law of Obligations…,* 172 –179; Th. Mayer – Maly, *Studien zur Frügeschichte der usucapio I,* Zeitschrift der Savigny – Stiftung für Rechtsgeschichte 77, 1960, 37; B. Noordraven, *op. cit.,* 188; G. Franciosi, *op. cit.,* 388-399. See also W. Erbe, *op. cit.,* 65; M. Kaser, *Das römische Privatrecht, I,* München, 1971, 127; F. B. J. Wubbe, *op. cit.,* 32 and 34.

usucapio (*usureceptio fiduciae*), despite of the fact that he is aware that the object belongs to the other person. Therefore, according to this theory, *usureceptio fiduciae* has been used only in cases when transferee returns in informal way the item that has been transferred to him formally[6].

According to the Wubbe's theory, *sciens rem alienam usucapit* means that transferee does not want to return the object or that *usureceptio fiduciae* has been granted to transferor in the cases in which transferee fails to perform his obligation of returning the item[7].

Apostolova – Maršavelski shares the opinion presented by the mostly accepted theory, but only for the period of classical law and she makes a difference whether the item in matter is movable or immovable. With regard to movable things, transferor has right to use regular *usucapio*. However, if thing is immovable, he is entitled to *usureceptio fiduciae*. According to Apostolova – Maršavelski, Gaius describes *usureceptio* of classical law which has been corrective institute of *fuducia cum creditore* or a substitute for evaded form (under the condition that the thing in matter is immovable)[8]. In the previous period, if the transferee wouldn't return the thing (even in those cases where, for example, the debt has been paid), transferor has been entitled to seize it and acquire through usureceptio fiduciae, with no difference if the item is movable or immovable thing. In this way, transferor re-establishes disturbed legal balance and brings the situation back in order[9].

We would have to be aware that Gaius explains *usureceptio fiduciae* in the parts of his text where he writes about usucapio (Gai Inst. II, 41-61)[10]. At the beginning Gaius says: "But if I neither sell an item to you nor surrender it in court, but only deliver it to you, the item becomes yours by bonitarian law, but still remains mine by *quiritarian* law, until you, through *possession*, acquire

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[6] R. Jacquelin, *De la fuducia,* Paris, 1891, 124-126; P. Oertman, *op. cit.,* 253; A. Manigk, *op. cit.,* 2306; W. Erbe, *op. cit.,* 66; M. Kaser, RPR I, 144, *Eigentum und Besitz im älteren römischen Recht,* 296 and Studien zum römischen Pfandrecht II, Actio pigneraticia und actio fiduciae, TR 47, 1979, 331; D. 46, 3, 80.

[7] F. B. J. Wubbe, *op. cit.,* 15-18. This theory was accepted by A. Watson, *The Law of Property in the Later Roman Republic,* Oxford, 1968, 43 and B. Noordraven, *Die fiduzia im römischen Recht,* 187.

[8] M. Apostolova – Maršavelski, O *Gajevu osvrtu na institut usureceptio fiduciae*, Zbornik Pravnog fakulteta u Zagrebu, 52 (5), 2002, 928-931 (which has been the very first article in our region dedicated to detailed analyses of usureceptio fiduciae, and at the same time to institute of fiducia, because usureceptio fiduciae has been the very first form of protection of fiducia).

[9] *Ibid,* 920.

[10] F. B. J. Wubbe, *op. cit.,* 13.

it by *usucapio*. As soon as usucapio is completed, the item becomes absolutely yours". As we could see there is no difference between cases in which transferee returns object given in *fuducia*, and cases where someone uses *traditio* for transferring *res mancipi*. In both cases parties knew that, in accordance to civil law, article still belongs to the transferor and they have agreed that possession should be transferred to transferee and that it would be transformed into ownership after the expiration of period proscribed for *usucapio*. So, when transferee informally returns item that has been transferred to him formally, transferor shall use regular form of *usucapio* instead of *usureceptio fiduciae*.[11] On the other hand, it seems pretty much illogical that *usurecptio fiduciae* has been established only because transferee didn't return the thing in prescribed form. It is more logical to assume that most often situation was that economically superior transferee wouldn't want to return the item exclusively from lucrative reasons even in the cases in which transferor has paid his debt or fulfilled the terms arranged in fiduciary agreement. For transferor it is much better when the object is returned to him even in informal way (because it is in his possession and he has the opportunity to regain it after the certain time period expires -through the regular *usucapio*), comparing to the situation when transferee didn't return the item. Therefore, the Wubbe's theory which stipulates that the expression sciens rem alienam usucapit represents the awareness of transferor that transferee doesn't want to return the item (but not awareness that he acquires something that already belongs to somebody else), seems mostly acceptable.[12] From the moment when transferor becomes aware that transferee doesn't want to return the item to him, he shall be entitled to usureceptio.

There is one more reason that could lead to conclusion that „*sciens rem alienam usucapit*" means the awareness that transferee doesn't want to fulfill his obligation of returning the object. According to some authors who claims that this expression means the awareness of acquiring item that belongs to other person, *usureceptio* should be used, same as regular *usucapio*, in the cases in which *traditio* has been used for the *res mancipi* transfer instead of *mancipatio* or in *iure cessio*. These claims do not seem logic. Why there are two institutes for the same purpose? On the other hand, this could mean that the time of establishing *usureceptio fiduciae* was the same as the time when the first informal ways of transferring *res mancipi* has appeared, because according to their words it has a purpose to transform possession into the

[11] F. B. J. Wubbe, *op. cit.*, 15-16; B. Noordraven, *Die fiduzia im römischen Recht*, 187
[12] F. B. J. Wubbe, *op. cit.*, 18.

ownership after the expiration of one year and that is probably the second half of the period of Republic. If we accept, as correct, this timeline of events, than we would have to conclude that *fiducia* hasn't been protected for more than three centuries or simply to conclude that *fiducia* itself has generated in the second half of the Republic period, because first type of it's protection has been *usureceptio fiduciae*. However, we witnessed that all of the authors place *fiducia* and *usureceptio fiduciae* back in time, most further to the period when the Law of Twelve Tables has been presented (this is the opinion even of those authors who stand on the position that previously mentioned expression means the awareness that someone is acquiring item that belongs to someone else, which presents certain contradiction).

At the very end, main purpose of concluding *fiducia* (that arises from fiduciary agreement) has been contradictory to such explanations of Gaius' formulation. Transferor is not concluding the *fiducia* with the intention to transfer ownership to transferee and make him an owner. He could do that without *fiducia*. He is entering into this arrangement and transfers his ownership, as the Isidorus explains in his *"Origines"* - " with the purpose of getting money loan from transferee"[13] (*fiducia cum creditore*), and then item is used as guarantee that he shall pay his debt, and it has to be transferred to him again after he fulfils his obligation or for the reasons of safe-keeping when he is ill or absent, but after he recovers or comes back he expects that the object is to be returned to him *(fiducia cum amico). Usureceptio fiduciae* was established for the cases where the confidence (fides- from this word the term *fuducia* originates)[14] has been infringed by transferee and not by bypassing prescribed form for ownership transfer. If transferee does not fulfil his obligation of returning the object which he took upon fiduciary agreement, transferor may claim the protection in form of *usureceptio fiduciae*.

3. IMPLEMENTATION OF USURECEPTIO AT FIDUCIA CUM AMICO AND FIDUCIA CUM CREDITORE

(Gai Inst. II, 60): Sed cum fiducia contrahitur aut cum creditore pignoris iure, aut cum amico, quo tutius nostrae res apud eum essent; et si quidem cum amico contracta sit fiducia, sane omni modo conpetit usureceptio; si vero cum creditore, soluta quidem pecunia omni modo conpetit, nondum

[13] „Fiducia est, cum res aliqua sumendae pecuniae gratie vel mancipatur vel in iure ceditur" (Isidorus, Origines, V, 25, 23).

[14] Polybii Historiae, XX, 9 (Polibije, *Istorije I i II*, prevod: M. Ricl, Novi Sad, 1988); M. Horvat, *Bona fides u razvoju rimskog obveznog prava,* Zagreb, 1939, 22-25.

vero soluta ita demum competit, si neque conduxeriteam rem a creditore debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucrativa usus capio conpetit.

In this text Gaius says that in the cases of *fiducia cum amico contracta* there is always possibility of *usureceptio fiduciae*. Where the *fiducia cum creditore* has been contracted, the *usureceptio fiduciae* is always possible if the debt has been paid. But if the debt is not paid, transferor is entitled to *usureceptio fiduciae* only if he didn't rent the thing or the thing wasn't given to him in *precarium* by transferee. This *usucapio* Gaius called lucrative.

Firstly, from this text comes out that in the both types of *fiducia* item could be given to *precarium* or rent. *Fiducia cum amico* has been contracted because of the reasons such as going to war, going on the long lasting travel, but also because of the fear from robbery or political opponents. In these cases the property has been transferred to the persons with higher social and political status, to those with better sources of protection, but actually it would stay to transferor in *precarium* or rent[15]. Where *fiducia cum creditore* has been contracted the thing remained into *precarium* or rent to transferor, because that was in mutual interest. Transferor keeps the items (cattle, slaves or land) that are necessary for his existence and also it makes it easier to him to complete his duties to transferee.[16]

In *fiducia cum amico* as well as in *fiducia cum creditore* when the debt is paid of, there are no doubts that *usureceptio fiduciae* is allowed, even if the transferor holds the item in *precarium* or rent. It is only demanded that transferor, who still holds the item due to precarium or rent, sends a request to the transferee for returning of the object in matter, because the conditions from fiduciary agreement are met (for example, he has return from war) or to pay his debt. These requirements are set because transferor who gets the item in *precarium* or rent does not hold it for himself (*pro se*), but for other person (*pro alio*), and for possession the will of a person to hold the thing for himself

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[15] V. Arangio – Ruiz, *Istituzioni di diritto romano,* Napoli, 1921, 190; B. Noordraven, *op. cit.,* 19.

[16] E. Huschke, *Ueber die usureceptio fiduciae,* Zeitschrift für geschichtliche Rechtswissenschaft 14, 1848, 262; P. Oertman, *op. cit.,* 254; O Karlowa, *op. cit.,* 569; A. Manigk, *op. cit.,* 2305; W. Erbe, *op. cit.,* 70 and 75; B. Noordraven, *Die fiduzia im römischen Recht,* 197; M. Kaser, *RPR I,* 460. Against the possibility that item could be left to transferor is F. B. J. Wubbe, *op. cit.,* 18, 23 and 33, because, according to his words, transferee is safe only until the item is left to him and he could give it, due to precarium or rent, to any other pearson, except transferor. G. Franciosi, *op. cit.,* 389 and that opinion is also shared by M. Apostolova – Maršavelski, *op. cit.,* 924-926 who considers that precarium and rent are the creations of classical law and that before that period item has always been left to transferee.

has to be publicly expressed (in the form of mentioned request at the *fiducia cum amico*, or in the form of paying the debt in the cases of *fiducia cum creditore*)[17].

Part of Gaius' text that causes most doubts (II, 60) is related to the case of *fiducia cum creditore* when the debt is not paid. For it Gaius claims that there is a possibility of *usureceptio fiduciae* under the condition that the transferee holds the item, and that sort of *usureceptio* he calls lucrative. Different opinions that exist in academic circles are even more supported by the Gaius' previous text about *usucapio pro herede*. There Gaius estimates this specific sort of *usucapio* not only unfair (*inproba*), but also lucrative (*lucrative*), because someone consciously is getting profit from the thing that belongs to someone else, and he says that such *usucapio pro herede* was possible until the time of Hadrian when the Senat enacted the decision (*senatus consultum*) that *usucapio pro herede* is not possible if there is any of mandatory heirs[18]. So Gaius explains why the lucrative and unfair *usucapio pro herede* is not allowed, but doesn't explain why the lucrative *usureceptio* is allowed in cases of *fiducia cum creditore* when the debt is not paid and item is in the possession of transferee.

Erbe, Wubbe and Watson[19] have an opinion, that Gaius' silence about this issue shows that he hasn't been able to define reasons, and according to Wubbe and Erbe, the final part of Gaius' text, (II, 60) – „*quo casu lucrativa usus capio competit*" (this sort of usucapio is called lucrativ) simply "limps" compared to previous parts of the text. Therefore, Erbe considered that this part was added by some of glossators and that Gaius actually wanted to say that *precarium* and rent prevent the transferor from using *usureceptio*. Wubbe had an opinion that this doesn't change the fact that *usureceptio* was allowed in a case when the debt is not paid and undertaken because of self-interests[20]. Wubbe uses this case of application of *usureceptio fiduciae* as an confirmation for the theory of existence of divided ownership, where the object belongs to transferee, but to the certain extent, it still belongs to transferor[21].

Because of Gaius' claim that *usureceptio fiduciae* is always allowed in the case of *fiducia cum amico* (the first form of fiducia), Noordraven thinks that

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[17] D. 43, 26, 11; F. B. J. Wubbe, *op. cit.,* 22-23; B. Noordraven, *Die fiduzia im römischen Recht,* 195-198; M. Apostolova – Maršavelski, *op. cit.,* 923.

[18] Gai Inst. II, 52-58

[19] W. Erbe, *op. cit.,* 65, 66 and 75; F. B. J. Wubbe, *op. cit.,* 29 (note 47); A. Watson, *The Law of Property…*, 46.

[20] W. Erbe, *op. cit.,* 65, 66 and 75; F. B. J. Wubbe, *op. cit.,* 29-30 (note 49).

[21] This theory has been created by M. Kaser, *Eigentum und Besitz im älteren römischen Recht,* 8 and RPR I, 126, and it was also developed by F. B. J. Wubbe, *op. cit.,* 34-36.

mentioned rule has to been expended on *fiducia cum creditore*, included the cases where the debt is not paid and the item is not holded by transferor in *precarium* or rent[22].

Apostolova – Maršavelski thinks that Gaius explained everything on this matter at *usucapio pro herede* and that *usureceptio fiduciae* was not allowed in classical law. She pointed out that Gaius in his text on *usureceptio fiduciae* mentiones its older version, which was possible even if the transferor didn't paid his debt, as well as classical version which was possible only if the transferor paid his debt[23].

This Gaius' text illustrates all of complexity of issues related to the *usureceptio fiduciae*. Firstly, it is hard to accept that *usureceptio* is possible when someone doesn't pay his debt. Even if it wasn't classified as a lucrative by Gaius, it would be certainly defined as such by all academics.

In the case of *fiducia cum amico*, usureceptio is allowed notwithstanding whether the object is held by transferor or transferee *(„sane omni modo conpetit usureceptio")*, and it's possible that this rule has been expended on *fiducia cum creditore* too[24]. In the case of *fiducia cum creditore* the thing has been (almost) always left to transferor, so the *usureceptio fiduciae* in the case of *fiducia cum creditore* (when the debt is not paid and the item has been left to transferee) was very rare in the practice.[25]

Why would the transferees, who had started professionally to work as money loaners in the period of commercialization of Roman economy,[26] put themselves to unnecessary waste of time and money needed for maintenance expenses for the objects transferred to them due to financial debt (for example: feeding and healthcare for cattle)[27]? It was much easier for them to left the object to transferor. On the other hand, it was comfortable solution for transferor itself, because he could use the object in order to take care of his family and collect the funds for paying his debts (for example, production and sale of dairy products). Erbe says that giving the objects (items) in

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[22] B. Noordraven, *Die fiduzia im römischen Recht*, 196, 199.

[23] M. Apostolova – Maršavelski, *op. cit.*, 922-923.

[24] B. Noordraven, *Die fiduzia im römischen* Recht, 199.

[25] E. Huschke, *op. cit.*, 262; P. Oertman, *op. cit.*, 254; W. Erbe, *op. cit.*, 70; G. Diósdi, *Ownership in Ancient and preclassical Roman law,* Budapest, 1970, 118; B. Noordraven, *Die fiduzia im römischen Recht*, 197 (note 140) and 199.

[26] B. Noordraven, *Von der "fiducia" zur Treuhandschaft*, 256 and 259.

[27] G. Diósdi, *op. cit.*, 118; S. Vladetić, *Fiducia cum creditore*, u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Knj. 4. Kragujevac: Pravni fakultet Univerziteta, Institut za pravne i društvene nauke, 2013, 19.

precarium or rent has been widely accepted very fast and *precarium* was something that has been assumed[28].

However, it could happen that transferor leaves the item to the transferee, if it wasn't necessary for his existence (movable thing)[29]. According to Oertman, there were some exceptional cases of *usureceptio fiduciae* before the debt has been paid. For example, when the transferee didn't take the item, nor did he leave it to transferor in which case he showed no interests in respect of the item that should serve for securing the claim[30]. It is not completely clear in which situation this could happen (maybe when the item was left "on the street"). However, we could imagine that transferee kept the item for himself, but he carelessly looked after it and it started to decay in front of the eyes of transferor (we should have in mind that the item always had greater value than transferor's debt) who had no legal means to prevent it. Due to lack of legal sources, it should be assumeed that in these extremely rare (almost theoretical) situations *usreceptio fiduciae* was allowed, even if the debt hasn't been paid.

4. REPOSSESION OF THE ITEM FROM TRANSFEREE

Gai Inst. III, 201: Rursus ex diverso interdum alienas res occupare et usucapere concessum est, nec creditur furtum fieri, veluti res hereditarias, quarum heres non est nactus possessionem, nisi neccessarius heres extet; nam necessario herede extante placuit nihil pro herede usucapi posse. Item debitor rem, quam fiduciae causa creditori mancipaverit aut in iure cesserit, secundum ea quae in superiore commentario rettulimus, sine furto possidere et usucapere potest.

Again, on the other hand, it is sometimes permitted to seize and acquire by *usucapio* property which belongs to another; and in such cases theft is not held to have been committed; as for instance, where property belonging to an estate of which the heir has not taken possession is seized, unless there is a necessary heir; for when there is a necessary heir, it has been decided that *usucapio* cannot take place in favor of a party acting as the heir. Likewise, in accordance with what we have stated in a former Commentary, a debtor who has transferred property to his creditor by mancipation or surrendered

[28] W. Erbe, *op. cit.,* 75 and 108 recalling D. 13, 7, 22, 3 that probably has been interpolated and originally dealt with fiducia (see also C. Longo, *op. cit.,*157; B. Noordraven, *op. cit.,* 274-275).
[29] B. Noordraven, *Die fiduzia im römischen Recht*, 197 (note 140) and 199. D. 13, 7, 22pr.
[30] P. Oertman, *op. cit.,* 254.

it in court on account of a trust, can take possession of the property, and acquire it by *usucapio*, without being guilty of theft.

Despite the fact that in literature we could find different opinions on this text[31], majority of authors share the common one, that Gaius says that transferor who uses the *usureceptio fiduciae* does not commits a theft[32].

First of all, the text presented in III, 201 is a part of Gaius' presentation on theft (III, 182-209), in which he analyses different sorts of theft, theft of free persons (e.g. gladiators), theft in the cases of deposit, actions, penalties, etc. So, the text III, 201 is a part of a larger complex and it can be analysed only in correlation with previous paragraphs dedicated to theft[33] as well as with some parts of individual texts.

If we took a point of view that seizing the object from transferee presents the theft, than we could conclude that *usureceptio fiduciae* hasn't been used, because it has a purpose only if we don't consider seizing of item as a theft. It would mean that transferee, who breaks confidence and doesn't return the item to the transferor after the fulfilment of condition or after paying the debt, has not been sanctioned at all until the establishment of *actio fiduciae***.** That is illogical. Why would Gaius than even mention *usureceptio fiduciae*?

At first, it looks logical to consider that transferor makes a theft when he seizes the item that belongs to transferee, because Gaius says in previous paragraph of *Instutiones* that debtor from *pingus* commits a theft if he secretly seizes his own item which he has given to creditor on behalf of the debt[34]. However, first sentence of paragraph 201 starts with the words *rursus ex diverso* – opposite of that, or to be more precise opposite to the statement given in paragraph 200 in which Gaius writes that seizing of own item could be considered as a theft[35]. So, in the first sentence of paragraph 201 Gaius wanted to emphasize that opposite to statements given in paragraph 200 it is sometimes allowed to seize someone's belonging and establish ownership by *usucapio*, and as example for this he gives the *usucapio pro herede*. After that he starts the second sentence of paragraph 201 with the words "*item debitor*..." – "the same as debtor..." It means that (as it is a case with *usucapio pro herede*)

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[31] P. Oertman, *op. cit.,* 250; W. Erbe, *op. cit.*, 73.

[32] E. Huschke, *op. cit.,* 251; R. Jacquelin, *op. cit.,* 127; H. Dernburg, *Das Pfandrecht nach den Grundsätzen des heutigen römischen Recht I,* Leipzig, 1860, 25; O. Karlowa, *op. cit.,* 570 A. Manigk, *op. cit.,* 2305; G. Grosso, *op. cit.,* 266; A. Watson, *The law of property…*, 43; F. B. J. Wubbe, *op. cit.*, 28; G. Diósdi, *op. cit.*, 118; B. Noordraven, *Die fiduzia im römischen Recht,* 189, 194 and 197.

[33] F. B. J. Wubbe, *op. cit.,* 19. See also: B. Noordraven, *Die fiduzia im römischen Recht*, 190.

[34] Same Erbe, W., *op. cit.* 73.

[35] B. Noordraven, *Die fiduzia im römischen Recht,* 190-191.

fiduciary debtor could seize the object and that action wouldn't be considered as a theft and also he could acquired ownership by *usucapio* (*usureceptio fiduciae*). At the end of text III paragraph 201 Gaius said: "*secundum ea quae in superiore commentario rettulimus*"- "accordingly to the mentioned in previous book". With these words Gaius recalls the paragraphs 59 and 60 of the Second book in which he writes that *usureceptio* is always allowed (*omni modo*) in the cases of *fiducia cum amico* as well as in the cases of *fiducia cum creditore*, except in the cases when the debt is not paid and the transferor holds the item due to *precarium* or rent[36]. Accordingly, where *fiducia cum amico* or *fiducia cum creditore* has been concluded and transferor seizes the item from the transferee in order to reacquire ownership by *usucapio* in the period of one year, it shall not be considered as a theft.

Considering that this is the main condition for applying the *usureceptio fiduciae,* it stopped to apply since this condition has been eliminated. The time when it happened could be determinated in Ulpian's text D. 13,7,22,pr which is considered to be interpolated[37]. The other part of Ulpian's text deals with the case in which the transferor seizes the item that has been left to transferee who is entitled to bring *actio furti* or *condictio furtiva* (without the obligation to calculate it into the debt of transferor)[38]. Permission for using of these two

[36] F. B. J. Wubbe, *op. cit.,* 19. See also: O. Stanojević, *Gaj: Institucije,* Beograd, 2009, 273 (zabeleška 71).

[37] Si [pignore subrepto] <fiducia subrepta> furti egerit creditor, totum, quidquid percepit debito eum imputare Papinianus confitetur, et est verum, etiamsi culpa creditoris furtum factum sit. multo magis hoc erit dicendum in eo, quod ex condictione consecutus est. sed quod ipse debitor furti actione praestitit creditori vel condictione, an debito sit imputandum videamus: et quidem non oprtere id ei restitui, quod ipse ex furti actione praestitit, peraeque relatum est et traditum, et ita Papinianus libro nono quaestionum ait. Lenel was the first one who pointed out that this text has been interpolated (O. Lenel, *Das Edictum Perpetuum,* 291 (note 2 and 3) and O. Lenel, *Palingenesia Iuris Civilis I (1023-1028)* and *Palingenesia Iuris Civilis II (579-619),* Neudruck Graz, 1960) and he based his opinion on the fact that Ulpian analysed the pignus on separate places at the commentary of edict (28. ad Edictum i 30. ad Edictum). Same A. Manigk, *op. cit.,* 2306; P. Oertman, *op. cit.,* 252; W. Erbe, *op. cit.,* 54; C. Longo, *op. cit.,* 78; H. Ankum, *Furtum pignoris und furtum fiduciae im klassischen römischen Recht I,* RIDA 26, 1979, 150 and Furtum pignoris und furtum fiduciae im klassischen römischen Recht II, RIDA 27, 1980, 123; F. B. J. Wubbe, *op. cit.,* 24; A. Watson, *The law of property…,* 42 (note 2); M. Kaser, *SRP II,* 324 (note 254); B. Noordraven, *Die fiduzia im römischen Recht,* 18; M. Apostolova – Maršavelski, *op. cit.,* 924.

[38] P. Oertman, *op. cit.,* 252; W. Erbe, *op. cit.,* 73; C. Longo, *op. cit.,* 122; F. B. J. Wubbe, *op. cit.,* 29 (note 46); S. Vladetić, *Fiducia cum creditore,* 18. That here we have the case of embezzlement instead of theft claims A. Manigk, *op. cit.,* 2306; A. Watson, *The law of property…,* 42 (note 2); H. Ankum, *Furtum pignoris und furtum fiduciae im klassischen*

means points out that basic condition for using *usureceptio fiduciae* was abolished in the time of Ulpian.

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römischen Recht II, RIDA 27, 1980, 131 (Compare Furtum pignoris und furtum fiduciae im klassischen römischen Recht I, RIDA 26, 1979, 150); B. Noordraven, *Die fiduzia im römischen Recht,* 210.

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